United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,886 477

SAMUEL E. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
Assistant United States Attorneys.

ROBERT S. BRADY,
Attorney, Department of Justice.

Cr. No. 310-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Is a post-conviction remedy available to appellant who raises the issue of a defective preliminary hearing for the first time on appeal when there was adequate time to seek relief below and where no resultant prejudice has been shown to have occurred from the committing magistrate's alleged failure to allow appellant to call witnesses in his own behalf pursuant to Fed. R. Crim. P. 5(c) and where appellant was subsequently indicted after voluntarily testifying before the grand jury?

2) Is it necessary to establish that pistols used to perpetrate a robbery were loaded and capable of being fired in order to convict of assault with a dangerous weapon when the assailants were within close range of the victims who would have been in apprehension of great bodily harm either from being shot or clubbed?

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OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,886

SAMUEL E. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Howard Lee, and Willie Carrington were jointly charged in a three-count indictment with robbery (22 D.C. Code § 2901) and two counts of assault with a dangerous weapon (22 D.C. Code § 502). Lee and Carrington entered pleas of guilty to the robbery charge, respectively, on October 5 and 6, 1965, and the two remaining counts against them were dismissed. Appellant was tried by jury and found guilty as charged. He was sentenced to imprisonment for 1 to 5 years on each count,

the sentences to run concurrently. Application for leave to appeal without prepayment of costs was granted by the trial court.

At about noon on Monday, December 21, 1964, appellant went into the MacArthur Market at the corner of MacArthur Boulevard and Dean Place, Northwest, purchased a candy bar and left (Tr. 39-41, 105-106). Approximately three or four minutes later two other men—subsequently identified as Howard Lee and Willie Carrington—entered the store (Tr. 42). Lee picked up some oranges and brought them to the check-out counter whereupon he pulled out a gun; announced that it was a holdup and demanded money (Tr. 50). Barry Mauskopf, proprietor of the market, opened the cash register and Lee scooped out the money (Tr. 48, 50-51). When he demanded more, Mauskopf gave him the money from his pockets. With that the robber went behind the counter and found a cigarette container holding loose change which he took along with the container. (Tr. 51.) Meanwhile the other man, with gun in hand, confronted a store employee, George Trice, and ordered him to the rear of the store where he was told to lie on the floor (Tr. 42-43, 51-52). After putting the money in the cigarette container the gunmen walked out of the store together (Tr. 52). Mauskopf watched them cross Dean Place and get into a light colored Oldsmobile double parked there (Tr. 52). He ran out of the store and wrote down the tag number of the car which he gave to a police officer, who was directing traffic at a nearby school crossing (Tr. 52-53). The officer relayed the information to the precinct through a police call box (Tr. 53).

Police Officers James Harrison and Vincent Meleo were also tending a school crossing when they received information over their scout car radio about the holdup and the getaway car (Tr. 57, 59). They immediately drove to MacArthur Boulevard, where they observed the wanted car and so advised the radio dispatcher (Tr. 58-59). The officers ordered the car to stop at the curb, drew their re-

volvers and, from behind the opened doors of their scout car, ordered the occupants of the wanted car to alight (Tr. 60). The first was appellant, who emerged from the driver's side and asked: "What is wrong?" (Tr. 61). Howard Lee who was in the front seat on the passenger's side was next to get out (Tr. 61). And finally, Carrington, the third man, who was crouched down on the back seat, came out of the automobile (Tr. 62). By this time other officers had arrived on the scene (Tr. 62). Officer Harrison searched the car and found a .38 caliber Smith and Wesson revolver loaded with four rounds of ammunition under the front seat on the passenger's side of the car (Tr. 62). On the floor behind the front seat Harrison found a cigarette container filled with money, both bills and change, and a small automatic pistol which was not loaded (Tr. 65-67).

Appellant's defense was that he was not an aider and abettor to the robbery but rather a victim who was forced at gun point to provide a getaway car for Lee and Carrington whom he had never seen before (Tr. 107-112). Appellant testified that he was on his way from Bethesda, Maryland to Arlington, Virginia to have lunch with his girlfriend when he stopped at the MacArthur Market to buy a candy bar (Tr. 103-106).

To rebut appellant's testimony that he did not know either of the co-defendants before the robbery, the Government called two police detectives who testified that they had seen Howard Lee in appellant's company prior to the time of the robbery (Tr. 143, 151). The detectives stated that Lee was an informer and that a month or more before the robbery they had seen Lee in appellant's car and wanted to talk to him (Tr. 143, 152). Lee had been brought to the precinct and appellant Johnson had followed in his car (Tr. 144). At the precinct, appellant had inquired whether Lee was in trouble and whether he could arrange bail for Lee. Subsequently, Lee left the precinct with appellant in appellant's car (Tr. 144-145, 153).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 5(c), Federal Rules of Criminal Procedure, provides:

> *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

SUMMARY OF ARGUMENT

I

An attack upon the preliminary hearing comes too late if raised for the first time on appeal when there was adequate time within which to seek relief below. Appellant, who asserts that the committing magistrate would not allow him to put on witnesses in his own behalf, failed to show any resultant prejudice which could have infected his conviction. For, the purpose of the preliminary hearing was to determine whether there was probable cause to warrant holding the accused; however, his subsequent indictment by the grand jury fulfilled this function and was not infected by the alleged defect.

II

This Court need not consider appellant's second contention if it finds that his conviction for robbery must be sustained since the sentence for that conviction is concurrent and coterminous with the sentences imposed for his two other convictions. In any event it was not necessary for the prosecutor to establish that the pistols used in the robbery were loaded and capable of being fired since it is common knowledge that in committing robberies pistols are frequently used as bludgeons. Moreover, one who threatens with a pistol in a menacing manner has the present apparent capability to do great bodily harm which is all that is necessary for an assault with a dangerous weapon.

ARGUMENT

I. Appellant, who raises the issue of a defective preliminary proceeding for the first time on appeal, was not prejudiced by the alleged defect which at most was harmless error and did not infect the subsequent indictment.

(Tr. 3-15, 143, 151, 178-179, 183-184, 186-187)

Appellant argues that he was not afforded a proper preliminary hearing under Rule 5(c) of the Federal Rules

of Criminal Procedure. In order to raise this contention, appellant readily admits in his brief that he has gone outside the record on appeal. His claim is "based on the recollection of the defendant and his [former] attorney, Harrison Pledger" (Br. 5). Appellant's allegation is that the judge of the Court of General Sessions, who conducted the preliminary hearing, would not allow him to produce witnesses in his own behalf, after the Government had put on its case and appellant had cross-examined the witnesses.

As in most cases, the necessity for going outside the record arises from the fact that appellant is raising this issue for the first time on appeal. Appellant's attack comes too late. This Court has made it plain that if appellant felt prejudiced by some defect in the preliminary hearing such a matter must be raised before trial, if there was time to do so. *Stith* v. *United States*, D.C. Cir. No. 19520, decided April 22, 1966; *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894, *cert. denied*, 380 U.S. 944 (1965). Clearly, appellant had sufficient time before trial to raise the alleged defect. The preliminary hearing occurred on December 22, 1964, when appellant was represented by retained counsel who remained in the case until June 23, 1965.[1] The trial did not begin until October 20, 1965. Appellant's retained counsel had six months within which to challenge the allegedly defective hearing. But neither the retained counsel nor the court appointed attorneys attacked the preliminary hearing; therefore, it may be assumed that any objections to the proceedings were considered and waived and no post-conviction remedies are available. *Blue* v. *United States*, *supra* at 321-322, 342 F.2d at 900.[2]

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[1] At appellant's request his retained counsel withdrew on June 23 to be replaced by the first of his court appointed lawyers. Appellant had a succession of three court appointed lawyers. The first served from June 23 to July 13; the second from July 13 to September 22; and the third, who was appellant's counsel at trial, served from September 23 to December 3, 1965.

[2] Appellant's *pro se* motion, in the form of a letter to Chief Judge McGuire, see note 4, *infra*, requesting a full preliminary hearing

Nevertheless, appellant urges that his conviction be reversed and vacated, not on the grounds of prejudice, but simply because his witnesses were not heard. Reliance is placed upon this Court's rulings in *Blue* v. *United States*, *supra*, and *Dancy* v. *United States*, D.C. Cir. Nos. 18,366 and 18,716, decided October 14, 1965 and modified February 11, 1966. However, it is quite clear that to warrant reversal of a conviction because of a defective preliminary hearing, some resultant prejudice must be shown. *Stith* v. *United States*, D.C. Cir. No. 19,520, decided April 22, 1966; *Hairston* v. *United States*, D.C. Cir. No. 19,594, decided March 31, 1966; *Dancy* v. *United States*, *supra*; *Blue* v. *United States*, *supra* at 321, 342 F.2d at 901. This, appellant has not done. Indeed, appellant is not now in a position to claim prejudice. The witnesses whom he would have presented at the preliminary hearing were his accomplices Lee and Carrington. Appellant claims they were prepared to exonerate him by stating that they had never been associated with him. (See affidavits, Appendices A and B to appellant's brief).[3] Under these circumstances it would have been perfectly logical to call them as defense witnesses at trial. However, appellant's seasoned trial counsel indicated to the court before trial[4]

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did not comply with the rigorous "standard of timely action" required by *Blue* to properly raise the issue of a defective preliminary hearing. The procedure set forth by this Court which an aggrieved defendant must follow is intervention by habeas corpus or mandamus. *Blue* v. *United States*, *supra* at 321, 342 F.2d at 900.

[3] There is some indication in the record that the co-defendants were terrorized, presumably by appellant, into making these affidavits. (See Tr. 8-10, 183-84, 186-87).

[4] This pretrial discussion related to appellant's attempt to discharge his court appointed counsel just before the trial. This was appellant's fourth lawyer. The three previous lawyers had been granted leave to withdraw at appellant's request (Tr. 3). See note 1, *supra*. Appellant had been so adamant about raising the *Blue* decision that each lawyer had found him to be uncooperative. In the end appellant filed a *pro se* motion, in the form of a letter to Chief Judge McGuire, requesting a full preliminary hearing and

that at appellant's persistent urging he was prepared to call Lee and Carrington as witnesses but that it was against his better judgment to do so, since both men had, in effect, indicated that they would not testify in appellant's favor (Tr. 11-12). This was, of course, in spite of the affidavits which these men had signed just prior to the trial. Consequently, Lee and Carrington were not called as defense witnesses. In fact, at one point during a bench conference the prosecutor indicated that he was considering calling Carrington as a Government witness (Tr. 183-184).

Furthermore, it is highly unlikely that Lee and Carrington would have been believed by the jury if they had been called as defense witnesses in view of the Government's rebuttal witnesses. Two police detectives were called to rebut appellant's testimony that he did not know Lee prior to the robbery. The detectives stated that they had seen Lee in appellant's company prior to the date of the robbery (Tr. 143, 151).[5] Thus, any prejudice which might have arisen from the alleged failure to hear Lee and Carrington at the preliminary hearing was at most harmless error because it could have been remedied by calling them as witnesses at trial. But as a practical consideration they were not called because it was believed that their testimony would not have been favorable.

In any event, if there were a defect in the preliminary hearing it did not infect the subsequent indictment of appellant. *Gilliam* v. *United States*, 116 U.S. App. D.C. 313, 323 F.2d 615 (1963); *United States* v. *Stevenson*, 170 F.Supp. 315 (D.D.C. 1959). *Cf. Godfrey* v. *United States*, — U.S. App. D.C. ——, 353 F.2d 456 (1965); *Crump* v. *Anderson*, — U.S. App. D.C. ——, 352 F.2d 649 (1965). And appellant has not attacked the validity

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the discharge of his court appointed counsel. These motions were heard and denied by the Chief Judge just before trial (Tr. 3-15; Orig. Rec. on Appeal).

[5] Additionally, the prosecutor proffered the testimony of another witness who would testify that appellant was in Lee's company on the morning of the very day of the offense (Tr. 178-179).

the threat, in a menacing manner, to commit a battery. Such a threat "in a menacing manner" would require the assailant to have the apparent present ability to carry out the threat so as to foreclose the charge from being brought against one who is making an empty or idle threat. Thus to the common law theory of assault, the statute has added the tort theory.

One of the contemporary commentators in the field of criminal law has stated that "the criminal law [has] tended to take over the tort concept of assault, not in substitution for its own concept, but in addition thereto. And hence unless limited otherwise by statute, a criminal assault may now be established on either basis . . . ." Perkins, Criminal Law 88 (1957).

Therefore appellee submits that one who threatens another with a pistol in a menacing manner has the present apparent ability to commit a battery sufficient to place another in reasonable apprehension of great bodily harm. For it is all too obvious that a pistol is such a weapon as is likely to do great bodily harm. Cf. *Tatum* v. *United States*, 71 U.S. App. D.C. 393, 110 F.2d 555 (1940). Consequently, it need not be shown that a pistol was loaded or capable of being fired for a conviction under Section 22-502.

that at appellant's persistent urging he was prepared to call Lee and Carrington as witnesses but that it was against his better judgment to do so, since both men had, in effect, indicated that they would not testify in appellant's favor (Tr. 11-12). This was, of course, in spite of the affidavits which these men had signed just prior to the trial. Consequently, Lee and Carrington were not called as defense witnesses. In fact, at one point during a bench conference the prosecutor indicated that he was considering calling Carrington as a Government witness (Tr. 183-184).

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In any event, if there were a defect in the preliminary hearing it did not infect the subsequent indictment of appellant. *Gilliam* v. *United States*, 116 U.S. App. D.C. 313, 323 F.2d 615 (1963); *United States* v. *Stevenson*, 170 F.Supp. 315 (D.D.C. 1959). *Cf. Godfrey* v. *United States*, — U.S. App. D.C. ——, 353 F.2d 456 (1965); *Crump* v. *Anderson*, — U.S. App. D.C. ——, 352 F.2d 649 (1965). And appellant has not attacked the validity

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the discharge of his court appointed counsel. These motions were heard and denied by the Chief Judge just before trial (Tr. 3-15; Orig. Rec. on Appeal).

[5] Additionally, the prosecutor proffered the testimony of another witness who would testify that appellant was in Lee's company on the morning of the very day of the offense (Tr. 178-179).

of the indictment. The purpose of a preliminary hearing is to determine whether there is sufficient evidence to establish probable cause that the accused committed a crime to warrant his being held for action by the grand jury. *Giordenello* v. *United States*, 357 U.S. 480 (1958). However, the grand jury is not limited in its deliberation only to those cases in which the accused has been bound over by a committing magistrate; it can consider any matter involving the possible commission of a crime. *United States* v. *Lucas*, 13 F.R.D. 177 (D.D.C. 1952), *appeal dismissed*, 91 U.S. App. D.C. 278, 201 F.2d 182; *United States* v. *Gray*, 87 F.Supp. 436 (D.D.C. 1949); see *Godfrey* v. *United States*, *supra*, at ——, 353 F.2d at 457. Therefore, even if appellant had been released at the preliminary hearing, this would not have precluded his later indictment. And the fact is that appellant, at his own request, testified before the grand jury when his case was being investigated and despite his testimony he was indicted. Furthermore, he has now been found guilty by a petit jury in a full-scale trial so that the chances of persuading a magistrate that no probable cause exists for his detention are speculative and do not warrant a post conviction remedy. Cf. *Blue* v. *United States*, *supra* at 322, 342 F.2d at 901.

We conclude therefore, that appellant, who raises the question of a defective preliminary hearing for the first time on appeal, has failed to show prejudice and that the alleged defect, which did not infect the subsequent indictment, was at best harmless error.

II. A pistol presented in a threatening manner at close range indicates a present apparent ability to commit a battery sufficient to place one in apprehension of great bodily harm not only for its characteristic use as a firearm but also for its well known use as a bludgeon.

(Tr. 42-43, 50-51)

Appellant's second contention is that his convictions for assault with a dangerous weapon were improper in that

the prosecution failed to prove beyond a reasonable doubt that the two pistols used by his accomplices in the robbery were dangerous weapons. Appellant argues that the prosecution was required to prove that the pistols were loaded and capable of being fired in order to establish that they were dangerous weapons.

The Court need not consider this claim if it finds that appellant's conviction for robbery must be sustained, since the sentences for the convictions of assault with a dangerous weapon are concurrent and coterminous with the sentence imposed for the robbery conviction. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Moore* v. *United States*, 117 U.S. App. D.C. 376, 330 F.2d 842 (1964).

In any event, appellant's contention is without merit. It was not necessary for the prosecution to prove that the pistols were loaded and capable of being fired. A pistol is a dangerous weapon not only for its characteristic capability of dispensing bullets, but also because it can be used as a club. *McGill* v. *United States*, 106 U.S. App. D.C. 136, 270 F.2d 329, *cert. denied*, 362 U.S. 905 (1960); *McIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951). Where, as in this case, the assailants were within easy reach of their victims (Tr. 42-43, 50-51), it is common knowledge that in committing robberies pistols are frequently used as bludgeons rather than as firearms.

Moreover, the District of Columbia statute covering assault with a dangerous weapon (22 D.C. Code § 502) merely provides a penalty for an offense which would otherwise be simple assault except for the fact that the act was committed with a dangerous weapon. Thus for the meaning of "assault" as comprehended in Section 22-502, we must look to the simple assault statute, Section 22-504, which provides a punishment for "Whoever unlawfully assaults or threatens another in a menacing manner. . . ." This statute indicates that the D.C. Code has adopted the common law theory of assault, that is, an attempt to commit a battery and to this has been added:

the threat, in a menacing manner, to commit a battery. Such a threat "in a menacing manner" would require the assailant to have the apparent present ability to carry out the threat so as to foreclose the charge from being brought against one who is making an empty or idle threat. Thus to the common law theory of assault, the statute has added the tort theory.

One of the contemporary commentators in the field of criminal law has stated that "the criminal law [has] tended to take over the tort concept of assault, not in substitution for its own concept, but in addition thereto. And hence unless limited otherwise by statute, a criminal assault may now be established on either basis . . . ." Perkins, Criminal Law 88 (1957).

Therefore appellee submits that one who threatens another with a pistol in a menacing manner has the present apparent ability to commit a battery sufficient to place another in reasonable apprehension of great bodily harm. For it is all too obvious that a pistol is such a weapon as is likely to do great bodily harm. Cf. *Tatum* v. *United States*, 71 U.S. App. D.C. 393, 110 F.2d 555 (1940). Consequently, it need not be shown that a pistol was loaded or capable of being fired for a conviction under Section 22-502.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
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BRIEF FOR APPELLANT SAMUEL E. JOHNSON

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In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

SAMUEL E. JOHNSON,
APPELLANT

v. No. 19,886

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LAUREN A. COLBY

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Attorney for Appellant
(By Appointment of This Court)

May 11, 1966

STATEMENT OF QUESTIONS PRESENTED

Appellant was convicted of robbery and assault with a dangerous weapon. The questions presented are as follows:

I. Where Appellant's two alleged accomplices in the robbery were ready and willing to testify at the preliminary hearing that Appellant was innocent, but, contrary to the provisions of Rule 5(c) of the Federal Rules of Criminal Procedure, the judge presiding at the hearing refused to allow Appellant to call any witnesses on his behalf, whether the defective preliminary hearing so vitiates and infects the subsequent trial and conviction of Appellant as to require reversal of his conviction.

II. Where Appellant was convicted of assault with a dangerous weapon (a gun), but the prosecution failed to introduce any affirmative evidence that the gun was actually capable of being fired, whether the prosecution met the requisite burden of demonstrating beyond reasonable doubt that the gun was, in fact, a "dangerous weapon", within the meaning of the statute.

BRIEF OF APPELLANT SAMUEL E. JOHNSON

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

SAMUEL E. JOHNSON,
APPELLANT,

v. No. 19,886

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF JURISDICTION

A jury convicted appellant on an indictment charging robbery and two counts of assault with dangerous weapon (violations of 22 D.C.C. 2901 and 22 D.C.C. 502). Appellant was sentenced by the Honorable William B. Bryant to 5 year concurrent sentences on each of the three counts. On December 20, 1965, Judge Bryant granted Appellant's request for leave to appeal without prepayment of costs, and ordered the transcript of the trial and pre-trial hearing prepared at government expense. The jurisdiction of this Court is founded upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

The defendant was tried on a charge of robbery (22 D.C.C. 2901) and two counts of Assault with Dangerous Weapon (22 D.C.C. 502). At the trial, there were six witnesses for the prosecution and three witnesses for the defense. Because there are certain inconsistencies between the testimony of the government witnesses on the one hand and the defense witnesses on the other and because this appeal is based partly on matters which are part of the transcript and partly on occurrences not contained in the transcript, it will be helpful to the Court to divide this statement of the case into four parts: the testimony of the government's witnesses, the testimony of the witnesses for the defendant, the testimony of the government rebuttal witnesses, and a description of the

defendent's preliminary hearing before Judge Scalley.

A. The Government's Witnesses

The first witnesses for the government were Barry Mauskopf, the owner of a grocery store on MacArthur Blvd., and Mr. Mauskopf's clerk, George E. Trice, Jr. Mauskopf and Trice testified that shortly after noon on December 21, 1964, the defendant Johnson entered their store and purchased a candy bar (Tr. 40). Johnson took approximately three minutes to make this purchase (Tr. 42), then paid for it and left the store (Tr. 42). Three or four minutes later, two men -- later identified as Howard Lee and Willie Carrington -- entered the store (Tr. 49). Each of the men had guns (Tr. 45 and 50). One man forced Trice to go to the back of the store and lie down, while the other man held up Mauskopf, took the money from the cash register and took the "change bucket" (which was made from a Kent Cigarette carton) (Tr. 49-50).

The two men then left the store. Mauskopf watched them as they left and saw them cross the street and get into a light colored, double parked car, which drove off (Tr. 52-53). Mauskopf went to the street and hailed a police officer who happened to be watching a school crossing near the store (Tr. 53). The police officer immediately went to a call box and telephoned the Seventh Precinct (Tr. 53).

The Seventh Precinct put out a radio call which was intercepted by two other officers on school crossing duty, Officers Harrison and Meleo. They drove their patrol car to MacArthur Blvd., where they saw a car answering the radio'd description, going east on the Boulevard (Tr. 58). They stopped the car and ordered the occupants to get out with their hands up. The first man out was the driver, the defendant Johnson, who is supposed to have said, "What is wrong?" (Tr. 68). The other occupants of the car were Howard Lee and Willie Carrington. A search of car turned up a loaded 38 caliber revolver (Tr. 62), a small, unloaded, black automatic pistol (Tr. 67), and a Kent cigarette carton containing small bills and change (Tr. 65).

B. Defense Witnesses

The principal witness for the defense was the defendant himself. He testified that on the day in question he went out to Bethesda to exchange some parts for his car (Tr. 103). After doing this at a Bethesda auto parts store,[1/] he started driving from Bethesda to Arlington, with the intention of visiting his girl friend, who worked at an Arlington hospital (Tr. 104). On the way, he got hungry and decided to stop for a candy bar. He stopped in

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1/ A sales slip from the store was entered in evidence, establishing that the defendant was in fact there on the 21st of December (Defendants Ex. 2).

front of Mr. Mauskopf's store, went in and got the candy bar and then sat in his car to eat it (Tr. 106). Suddenly, two strange men with guns opened the door of the car and ordered the defendant to drive them off (Tr. 107). He did so, but as the car was going down MacArthur Boulevard, it was stopped by the police, and all three passengers were arrested.

C. The Government's Rebuttal

In rebuttal, the government called two police detectives, Messrs. Augustine Joseph Anastasi and Ludwig A. Lewandowski. They testified that Howard Lee had been a police informer (Tr. 143) and that on a day in the latter part of November, 1964, or early part of December, the two detectives saw Lee in an automobile in the 3100 block of 14th Street, Northwest (Tr. 143). They wanted to talk to Lee about a housebreaking case (Tr. 144), so they stopped the car and asked him to come down to police headquarters for questioning (Tr. 144).

The man driving the car, according to Detectives Lewandowski and Anastasi, was the defendant Samuel E. Johnson (Tr. 144), and there were also two other Negro males in the car (Tr. 144).

Lee got into the police cruiser and was driven to the precinct house (Tr. 144), while Johnson remained in his own car and followed behind (Tr. 144). Johnson remained at the station house while the police talked to Lee, and when the questioning was finished, Johnson departed with Lee in Johnson's car (Tr. 145).

No arrest was made, and no written record was made of the transaction (Tr. 145 and 154).[2/]

D. The Preliminary Hearing Before Judge Scalley

Up to this point, the recitations set forth herein have been supported by transcript references. However, on the day of his arrest, the defendant was taken before Judge Scalley in General Sessions Court, for a preliminary hearing. No transcript was made of the hearing, so the facts set forth here with respect to the hearing are necessarily based on the recollection of the defendant and his then-attorney, Harrison Pledger.

Defendant was accompanied to General Sessions by his alleged accomplices, Lee and Carrington. They were prepared to testify on his behalf, state that he was indeed an innocent victim of circumstances, and exonerate him of any connection with the hold-up.

The government called the complaining witnesses and arresting officer and they told their story of the hold-up and apprehension of the defendant, and Lee and Carrington. Judge Scalley permitted cross examination of the government witnesses, but when the defendant attempted to produce his witnesses, the Court said, in substance, "I've heard enough", and ordered the defendant to jail, to be held for trial.

2/ The legality of this detention, as applied to Lee, is extremely doubtful!

Subsequently, the defendant testified before the Grand Jury, but was not able to clear himself. And by the time of the trial, it appears that Lee and Carrington were no longer willing to testify on the defendant's behalf (Cf., Tr. 10-11).

In October, 1965, Appellant obtained affidavits from Lee and Carrington, affirming that at the time of the preliminary hearing they were prepared to assert his innocence. Copies of these affidavits are attached to this brief and marked Appendices A and B.

STATUTES AND RULES INVOLVED

District of Columbia Code, Title 22, Section 502:

> "§22-502. Assult with intent to commit mayhem or with dangerous weapon."
>
> "Every person convicted of an assault with intent to commit mayhem, or of an assult with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, §804.)"

District of Columbia Code, Title 22, Section 2901:

> "§22-2901. Robbery."
>
> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty or robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fiteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810.)"

Federal Rules of Criminal Procedure, Rule 5(c):

"(c) Preliminary Examination."

> The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

STATEMENT OF POINTS

1. Where a defendant was given a preliminary hearing pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure, and was denied the right to produce witnesses to testify on his behalf at the preliminary hearing, as required by the Rule, the defendant's subsequent conviction should be reversed.

2. Where the prosecution in a case of Assault with Dangerous Weapon failed to show that the alleged dangerous weapon, a pistol, was capable of being fired at the time of the alleged assault, the prosecution failed to sustain its burden of proof, and the conviction should be reversed.

SUMMARY OF ARGUMENT

I

Appellant was charged with holding up a grocery store, in complicity with two other men. His two alleged accomplices were ready and willing to appear at the preliminary hearing in General Sessions and testify that Appellant had no part in the crime, but -- contrary to the requirement of Rule 5 of the Federal Rules of Criminal Procedure -- the presiding judge refused to allow the Appellant to call any witnesses at the hearing, and he was bound over for trial and subsequent conviction. This, it is submitted, constituted reversible error, requiring that the conviction be vacated.

II

The government failed to meet the burden required by 22 D.C.C. 502 (assault with dangerous weapon) of proving beyond reasonable doubt that the pistols used in the robbery were, in fact, capable of being fired and therefore were "dangerous weapons" within the meaning of the statute.

ARGUMENT

I. APPELLANT WAS DEPRIVED OF THE PROPER PRELIMINARY HEARING GUARANTEED BY RULE 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Two errors are urged on this appeal,[3/] the first of which is that Appellant was deprived of the proper preliminary hearing required by Rule 5 of the Federal Rules of Criminal Procedure.

3/ Appellant has asked appointed counsel to make two other arguments, to wit: (1) that the testimony of the police officers against him was perjured; and (2) that he had ineffective counsel.

There is nothing in the record to establish perjured testimony. So far as "ineffective counsel" is concerned, Appellant originally had retained counsel, and thereafter the Court appointed three different appointed counsel to represent Appellant, because Appellant was not satisfied with the first ones. Appellant's last lawyer, who tried the case, was a seasoned trial attorney with many years of experience in the criminal law, and counsel here has been unable to discover any evidence of ineffective assistance to the Appellant by previous counsel (Cf., Tr. 12).

For these reasons, counsel has not pressed the matters of "effective counsel" or "perjured testimony" in this brief. None-the-less, these matters are mentioned here, so that the court may be informed that they have been considered. Cf., concurring opinion of Burger, J., in Johnson v. U.S., Case No. 19,969, filed May 2, 1966.

The Appellant in this case did not actually hold up the grocery store, but was charged, in substance, with being an accomplice and driving the get-away car. His two alleged co-conspirators were ready and willing to appear at the preliminary hearing, and corroborate the Appellant's testimony that he was an innocent motorist forced by gunmen to drive a get-away car. However, although Rule 5 of the Rules of Criminal Procedure states specifically that the defendant in a preliminary hearing "may cross examine witnesses against him and may introduce evidence in his own behalf", the presiding judge at Appellant's hearing curtly refused to hear the Appellant or either of the other two witnesses he sought to call. Yet, if the judge had heard these important witnesses, it seems clear that Appellant would never have been bound over for trial at that time.

This Court and other Courts of Appeal have repeatedly stressed the importance to defendants of a proper preliminary hearing. In Blue v. United States, 119 U.S. App. D.C. 315, 342 F. 2d 894 (1965), cert. den'd 380 U.S. 944, this Court held that a defendant is entitled to counsel at a preliminary hearing. Subsequent to Blue, this Court has refined and perfected its holdings with respect to the necessity for a proper preliminary hearing. See, Shelton v. U.S., 120 U.S. App. D.C. 65, 343 F. 2d 347 (1965); McGill v. U.S. and Hinton v. U.S., ___ U.S. App. D.C. ___, 348 F. 2d 791 (1965); and Crump v. Anderson, ___ U.S. App. D.C. _____, 352 F. 2d 649 (1966).

In the recent case of Oscar Dancy, Jr., v. U.S. case nos. 18,366 and 18,716, Slip. Op. filed February 11, 1966, this Court reversed the conviction of a defendant deprived of counsel at a preliminary hearing -- even though the appellant had actually completed serving his sentence by the time the appeal was heard.

Except for one very important difference, the instant case is similar to that of Gilliam v. U.S., 116 U.S. App. D.C. 313, 323 F. 2d 615 (1963). In Gilliam, the defendant -- like the defendant here -- was permitted to cross examine prosecution witnesses, but was not permitted to introduce evidence of his own. This court held that the preliminary hearing was "infected" with "shortcomings", but that these shortcomings did not invalidate the subsequent trial and conviction. In a concurring opinion, Judge Wright added,

> "I concur reluctantly in affirmance. When police brutality and judicial intemperance resulting in a denial of due process of law appear in a criminal proceeding, it may well be that responsible administration of justice requires that the proceedings be set at naught, even though the brutality and the intemperance cannot be shown to have infected the trail itself. Only the overwhelming proof of guilt here makes this case an inappropriate one for breaking new ground by imposing this prophylactic sanction. Compare concurring opinion in Killough v. United States, 114 U.S. App. D.C. 305, 317, 315 F.2d 241, 253 (1962).

The important significant distinction between Gilliam and the instant case is one of timing. In Gilliam, this Court

put the judges of the Court of General Sessions on notice that the failure to afford defendants their right to introduce evidence at a preliminary hearing was indeed a "shortcoming". Thus, the Court of General Sessions has been warned. Yet, the occurrences at the preliminary hearing held for Appellant Johnson show that the Court has not heeded the warning of this Court. Moreover, in the cases subsequent to Gilliam, this court has reinforced its warning, by holding that such occurrences as deprivation of counsel at a preliminary hearing warrant reversal of a subsequent conviction.

This Court should act now to insure that future defendants in proceedings in General Sessions will have all of the rights guaranteed them by Rule 5 of the Rules of Federal Criminal Procedure. The appropriate action for this Court to take to accomplish that objective is to reverse and set aside the conviction of Appellant Johnson.

II. THE GOVERNMENT FAILED TO ESTABLISH BEYOND REASONABLE DOUBT THAT A DANGEROUS WEAPON WAS INVOLVED IN THIS CASE.

Appellant's conviction under the statute relating to Assault with Dangerous Weapon (22 D.C.C. 502) was entirely improper, inasmuch as the prosecution failed to establish beyond reasonable doubt that any dangerous weapon was involved.

True, two pistols were used in the crime, and 22 D.C.C.

3201 defines a pistol as a "dangerous weapon". However, there was no proof of any kind offered by the government to establish that either of these pistols could be fired. In fact, one of the pistols was unloaded when found, and there is some indication that the other pistol -- while loaded -- may have been partly loaded with the wrong kind of ammunition (See, Tr. 64).

In prosecutions for unlawfully carrying conclealed weapons (22 D.C.C. 3204), the question of whether the gun is loaded is one of the factors which the jury may consider. Cf., Wilson v. U.S., 91 U.S. App. D.C. 135, 198 F. 2d 299(1952); Bell v. U.S., 49 App. D.C. 367, 265 F. 1007 (1920). Here, where a much more serious offense is involved, the prosecution should surely be required to establish beyond reasonable doubt that the weapon is not only loaded, but is capable of being fired.

III. CONCLUSION

For the foregoing reasons, Appellant submits that the Judgement of conviction should be reversed.

Respectfully Submitted,

Lauren A. Colby
930 F Street, N.W.
Washington, D.C. 20004

Attorney for Appellant
(Appointed by this Court)

Affidavit

I Willie Carrington do hereby swear that on December 22, 1964, I had expressed to Harrison R. Hodges Jr. acting as defense council for Samuel E. Johnson that I would appear at his preliminary hearing to exonerate him, also that I had never had any previous association with him. But I was not called upon to do so.

I Willie Carrington am signing the above affidavit of my own free will, and without enticement or cohersion of any kind.

Subscribed and Sworn to before me this 1 Day of October 1965.

[signature]

Appendix B

Affidavit

I Howard W. Lee do hereby swear that on December 22, 1964, I had proposed to Harrison A. Hodges Jr. acting as Defense Council for Samuel E. Johnson that I would appear at his preliminary hearing to exonerate him, also that I had never had any previous association with him. But I was not called upon to do so.

I Howard W. Lee am signing the above affidavit of my own free will, and without enticement or coersion of any kind.

Subscribed and Sworn to before me this 17 day of September 1965.

_____